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By facsimile only

August 13, 2002

Thomas J. Frederick, Esquire
Winston & Strawn
35 West Wacker Drive
Chicago, Illinois 60601-9703

Re: *United States v. Philip Morris, Inc., et al.*, Civil No. 99-CV-2496 (GK) (D.D.C.)

Dear Mr. Frederick:

We write in response to your July 17 and August 5, 2002 letters concerning the deletion of relevant email by Philip Morris Incorporated, without saving or printing such documents or electronic files. As a preliminary matter, we believe that the absence of certain basic information about the loss of this relevant information has been and continues to be an impediment to a full evaluation of this issue by the parties. Specifically, the fact that your recent correspondence omits information responsive to certain inquiries in Ms. Brooker's letter of July 3, 2002 makes it difficult for the United States to fully evaluate the impact of this matter or to make a fully informed response to the proposal in your August 5 letter. In order to take concrete steps forward in the assessment of the problems this issue poses, we re-state certain of the questions here.

In Ms. Brooker's July 3, 2002 letter, we asked for the date(s) on which Philip Morris counsel discovered that email had been destroyed in violation of the preservation orders. Your response that this discovery occurred "during the course of deposition discovery" at some point before or during April 2002, leading to your June 17, 2002 letter to the Court, is inadequate for several reasons. For one, it is impossible to determine from this response how much time elapsed between Philip Morris' learning of the problem and the June 17 letter. For another, your statements give rise to the reasonable inference that at least some of the destroyed email came from the files of deponents in this action and that although Philip Morris knew this prior to the depositions in question, it nevertheless chose not to reveal the fact of the destruction until two weeks before the close of fact deposition discovery.

The July 3 letter also asked Philip Morris to explain the factual basis for its belief that employees failed to preserve email and how it learned of the email destruction. Your letters offer no response to this other than the statement that Philip Morris counsel "received information" "during the course of deposition discovery," which offers no basis for the United States to begin the evaluate the full scope of the problems posed by the deletion.

We also asked Philip Morris to identify the affected employees and their job titles – this is crucial information, especially in light of Order #210. Philip Morris refused to provide information about *any* of the affected employees, responding instead that Philip Morris could not easily identify *all* affected employees and therefore had not attempted to make that identification. As set out above, we infer from the timing of your "discovery" and your reference to "the responsibilities of the employees involved in the deposition discovery process" that at least some of these known employees are deponents in this action. The United States is entitled to know which depositions likely were affected by this development, and Philip Morris has no reasonable basis for withholding the requested information. Furthermore, in light of the information requested by the Court in Order #210, it is essential that Philip Morris inform the United States of the identities of all affected deponents at the earliest possible opportunity.

Philip Morris asserts that the email destruction was "inadvertent" based on "the total absence of any information that would suggest that any employee knowingly and intentionally deleted any email" covered by the preservation orders. Nevertheless, you also admit that the destruction resulted from some employees' affirmative failure to preserve documents. The United States is entitled to the information Philip Morris does have indicating that certain employees did not abide by the preservation orders entered in this case, so as to make its own determination of whether such failure was intentional or merely negligent, and also to assess the potential volume of email that has been irretrievably lost.

Answers to these questions will serve to get the parties beyond a mere assessment of the proposal contained in your letter of August 5, which we nevertheless address here. As we understand it, the email recovered by Philip Morris, from which the production contemplated in your letter would occur, is only a complete, system-wide recovery from October 2001 onward. The sparser, individual specific electronic back-up available from before that time only extends back from the date documents were collected from those individuals to the prior system-wide deletion at Philip Morris. You indicated that you were unaware of of when the system-side deletion immediately prior to October 2001 occurred, but we assume that that date, likely in the year 2001, represents the beginning date for the entire universe of recovered files from which a production would take place. Accordingly, the August 5 proposal involves nothing more than documents responsive to supplementation requests, created on or after January 1, 2001, and does not address the deletion issue as it relates to documents responsive to the United States' Preliminary or Comprehensive Requests.

Beyond problems stemming from these types of scope limitations, we see several additional problems with respect to the proposal outlined in your letter of August 5. In general, the United States believes that your proposal is unnecessarily cumbersome and time-consuming. Our overarching concern is that responsive documents be reviewed and produced at the earliest possible time, in order to minimize any further impact of this late production on the Court's schedule. The United States believes that Philip Morris, rather than the United States, should bear the burden of taking any extra steps necessary to achieve this end.

First, we are concerned that Philip Morris' description of the universe of recovered email as possibly including much material that is "nonresponsive, already produced in this action, or duplicative," will result in the "make available" production of a very large volume of irrelevant or duplicative material that the United States, rather than Philip Morris, will be forced to sift through. The United States believes that Philip Morris should eliminate nonresponsive, duplicate, and already-produced material from the collection prior to any review and selection by the United States.

Second, as described above, we believe Philip Morris should perform its responsiveness review prior to making documents available for review. The United States will not agree to any provision allowing Philip Morris to wait until after review and selection by the government to designate and refuse to produce certain documents as "nonresponsive."

Third, the United States is not satisfied that Philip Morris' "preliminary" privilege screening process has been sufficiently diligent. In its review of the collections produced pursuant to Orders #69 and #103, Philip Morris withheld over 10% of the affected collections as "potentially privileged" and then determined, beginning over five months later, that approximately 75% of the withheld documents were not in fact privileged. Please advise how you intend to prevent a recurrence of this problem.

Fourth, given the extreme untimeliness of this production, the United States believes that privilege logs should be produced on a schedule that is more accelerated than the 90 days provided in Order #51. We propose that privilege logs be produced on a rolling basis within 30 days of the date of production. Moreover, documents that Philip Morris withholds for further review based on "potential privilege assertions" should be produced as soon as determinations are made as to whether to log the documents. Under the proposal in your letter of August 5, the United States would not receive privilege logs or the production of potentially privileged documents until early February.

Fifth, while post-inspection confidentiality review is acceptable, the United States believes that a time limit for review and production must be in place in order to ensure timely production. In the absence of any knowledge of the potential volume, we would propose that documents selected by the United States be produced at a rate of 40,000 pages per day beginning

20 days after review begins. In addition, any deviation from such a schedule should require a detailed explanation.

Sixth, please explain how Philip Morris determined that the population of documents related to Attachment A is responsive to general Supplementation Requests Nos. 2, 5, 8, 9, 10, and 11, but not to the remaining general Requests for Supplementation.

Seventh, please explain how Philip Morris intends to limit its search for email responsive to the Requests for Supplementation in connection with depositions without using the names of the affected deponents, which are not included on the list submitted as Attachment B.

Eighth, we believe that some of the proposed lists of keyword search terms are underinclusive. For example, the list for Supplemental Request No. 5 does not include "anti-smoking campaign," "anti-smoking activity,"or "anti-smoking initiative" (or just "anti-smoking") and includes "smoking ban(s)" and "economic impact of smoking ban(s)" but does not include "smoking restriction(s)" or "economic impact of smoking restriction(s)."

In sum, while we are of course willing to discuss your proposal in greater detail, we will be unable to reach agreement in the absence of, at a minimum, the basic information sought in this letter. We suggest that you provide the identities and job titles of the employees known to be affected by the email destruction by the close of business Friday, August 16, 2002. We then propose that we discuss remaining issues next week and ask whether you are available to speak with us on Wednesday, August 21.

Very truly yours,

Stephen D. Brody

Michelle Gluck/SDB

Michelle Gluck

cc: Jonathan M. Redgrave, Esquire (by facsimile)
Leonard A. Feiwus, Esquire (by facsimile)